STATE OF MICHIGAN

COURT OF APPEALS

RICHARD P. FOUST and JULIE A. FOUST, Personal Representatives of the Estate of HOLLY K. FOUST,

Plaintiffs-Appellants/Cross-Appellees,

v

PATRICIA R. MATEJEK,

Defendant-Appellee/Cross-Appellant,

and

ROBERT J. MATEJEK, DONALD R. LYON II, and DONALD R. LYON, JR.,

Defendants-Appellees,

and

BRENT E. SHELTON, MARCIA E. SHELTON and DAIMLERCHRYSLER CORPORATION,

Defendants.

UNPUBLISHED
October 5, 2004

No. 246437
Wayne Circuit Court
LC No. 01-114878-NI

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the jury verdict of no cause of action in this negligence action. Specifically, plaintiffs appeal the trial court's denial of a directed verdict on the issue of negligence and the trial court's failure to give a requested jury instruction. Defendant, Patricia

R. Matejek,[1] cross-appeals the trial court's denial of her motion for directed verdict on the issues of negligence and causation. We affirm.

Shortly after 6:00 a.m. (before sunrise) on September 3, 2000, defendant, Brent E. Shelton, was driving southbound on I-75, which is a limited access three-lane highway with a minimum speed of forty-five miles per hour and a maximum speed of seventy miles per hour. There was light traffic, and the weather was clear. Shelton was driving down a slight crest in the roadway when he spotted a dog in the left lane. He swerved to avoid the dog and lost control of his Honda Accord. The Accord hit the median and stopped perpendicular to the wall, blocking the left lane.

Driving her Dodge Durango at sixty-five to sixty-eight miles per hour, Matejek came over the crest in the roadway and approached Shelton's Accord in the left lane. When she saw the Accord, she was unable to transfer into the right lane because it was occupied by a pick-up truck towing a boat. Matejek attempted to slow down and steered to the right, but she struck the Accord and lost control of the Durango. She then collided with the pick-up truck, skidding sideways and stopping against the guardrail on the right side of the road. After the impact with Matejek's Durango, the Accord may have been partially blocking the center lane. A Ford Escort traveling in the center lane collided with the Accord, followed by a Ford Tempo.[2]

Defendant, Donald R. Lyon II,[3] was driving his father's Ford Taurus station wagon in the left lane at a rate of seventy miles per hour when he approached the Accord. Lyon's passengers included Holly K. Foust in the front seat and one boy and one girl in the backseat. When Lyon drove over the crest and saw the Accord, he braked and attempted to steer around it. The rear of the Taurus collided with the Accord, and Lyon lost control of the Taurus, skidding sideways across the highway. The passenger side of the Taurus struck the Durango, and Foust was pronounced dead on arrival at the hospital.

Plaintiffs argue that the trial court erred in denying their motion for directed verdict on the issue of negligence. Because Matejek and Lyon were unable to stop within the assured, clear distance ahead in violation of MCL 257.627(1), plaintiffs contend that defendants were negligent as a matter of law. We review de novo a trial court's decision on a motion for directed verdict, which is appropriate only when no factual question exists upon which reasonable minds could differ. *Elezovic v Ford Motor Co*, 259 Mich App 187, 191; 673 NW2d 776 (2003). To establish a prima facie case of negligence, a party must prove four elements: (1) a duty owed to the party, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

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[1] We will refer to Patricia R. Matejek as "Matejek," as defendant Robert J. Matejek will not be referenced in this opinion.

[2] The collisions involving the Escort and the Tempo are not at issue in this appeal.

[3] We will refer to Donald R. Lyon II as "Lyon," as defendant Donald R. Lyon, Jr. will not be referenced in this opinion.

Plaintiffs were not entitled to a directed verdict on the issue of negligence if a reasonable juror could have found there was no negligence on defendants' part. *Elezovic*, *supra* at 191. At trial, there was no dispute regarding defendants' conduct behind the wheel. Both Matejek and Lyon, traveling at or below the speed limit, reached the top of a slight crest in the road to find the Accord blocking their lane of travel. Plaintiffs do not allege that any "evasive action" taken by Matejek or Lyon was negligent, only that Matejek and Lyon were driving too fast to allow them to stop in time once they were able to perceive the Accord.

It is undisputed that neither Matejek nor Lyon was able to stop in the assured clear distance ahead in violation of MCL 257.627(1), but MCL 257.627 does not apply when a collision results from a sudden emergency that is not of the defendant's own making. *Vander Laan v Miedema,* 385 Mich 226, 231; 188 NW2d 564 (1971). The sudden emergency doctrine applies when the circumstances of the accident present a situation that is unusual or unsuspected. *Id.* at 232. "Unusual" means that the factual background of the case varies with the everyday traffic routine confronting the driver, such as a phenomenon of nature. *Id.* "Unsuspected" connotes a potential peril within the everyday movement of traffic. *Id.* The peril must not have been in clear view for any significant length of time and must be totally unexpected. *Id*.

In *McKinney v Anderson*, 373 Mich 414; 129 NW2d 851 (1964), the defendant was traveling at night, within the speed limit, when he came to the crest of a hill and noticed taillights about four hundred feet away. When he was two hundred feet away, the defendant realized that the taillights were not traveling as fast as the defendant's car. The defendant was unable to stop in time and collided with the back of the plaintiff's car. Although the defendant admitted that he was traveling too fast to be able to control and stop his car before it collided with the plaintiff's car, the Court found that the plaintiff was not entitled to a directed verdict on the issue of negligence:

> While it is true that a violation of the rear-end collision statute gives rise to a *prima facie* case of negligence and a violation of the assured-clear-distance-ahead statute constitutes negligence *per se*, such presumption is overcome and such negligence is found not to exist when the collision is proven to have occurred in the midst of a sudden emergency not of defendants' making.
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> Viewing the testimony, as we must, in the light most favorable to defendant, we find that plaintiffs' car was stopped, without a signal from plaintiff driver, despite the fact that defendants' headlights were visible to plaintiff by rear view observation; that a ravine on the right and a car on the left prevented defendant driver from turning to either side; that defendant driver was driving within the posted speed limit and had shortly before crested a hill. A jury could reasonably have found these facts constitute a situation of sudden emergency not brought about by defendant driver. Therefore, the . . . denial of plaintiffs' motion for directed verdict [was] proper. [*Id.* at 419-420 (footnotes omitted).]

Matejek and Lyon were driving at or below the speed limit on a limited access highway during good weather. There was light traffic, and both drivers crested a slight rise in the freeway to find a car blocking their lane of traffic without enough time to avoid a collision. A reasonable

juror could therefore find that they were not negligent under the sudden emergency doctrine. *Elezovic, supra* at 191. Accordingly, plaintiffs were not entitled to a directed verdict on the issue of negligence.

Plaintiffs claim that Matejek and Lyon cannot invoke the sudden emergency doctrine because the emergency was created by their own negligence, i.e., by "out-driving" their headlights. Plaintiffs rely on two accident reconstruction experts, who testified that Matejek and Lyon "out-drove" their headlights. According to the experts, "out-driving" one's headlights means that a car is traveling at a speed at which it is impossible for the driver to perceive an object revealed by the headlights and stop in time to avoid it. One of plaintiffs' experts found that a car driving above fifty-three miles per hour at night, and relying on its headlights for adequate lighting to avoid a situation, is "out-driving" its headlights. Therefore, probably every driver (including Matejek and Lyon) involved in this accident "out-drove" their headlights, which is not a problem as long as there are no hazards in the roadway. One of plaintiffs' experts also testified, however, that anyone who drives over forty miles per hour at night on I-75 in a Ford Taurus "out-drives" his headlights.

Plaintiffs argue that "out-driving" one's headlights constitutes negligence as a matter of law, and they cite numerous cases, which are factually distinguishable. Many involved the former law of contributory negligence and none involved a sudden emergency that was not of the defendants' own making. Furthermore, we distinguish these cases, the most recent of which is from 1961, because they do not involve a limited access highway. Limited access highways are specifically designed for technologically advanced cars to travel at higher and more uniform speeds safely by eliminating pedestrians, slow moving vehicles, and other hazards. To base a driver's negligence solely on whether he "out-drove" his headlights in the situation presented here would require a driver to violate the law, by driving below the minimum speed limit, to avoid violating the law regarding being able to stop in time to avoid objects revealed by their headlights. This absurd result demonstrates the fallacy of plaintiffs' position. We conclude that the fact that Matejek and Lyon "out-drove" their headlights does not establish negligence per se where the accident occurred on a limited access interstate freeway.

Plaintiffs next argue that the trial court erred in failing to give a jury instruction based on the rear-end collision statute, MCL 257.402(a). Although it is apparent from the transcript that the trial court denied plaintiffs' requested special jury instructions, there is no evidence in the lower court record that plaintiffs requested this particular instruction. This issue is therefore unpreserved. *Fast Air, Inc v Knight,* 241 Mich App 288, 300; 616 NW2d 175 (2000). We find that the evidence adduced at trial did not support an instruction based on MCL 257.402(a) because the Accord was neither lawfully in the roadway, nor proceeding in the same direction as the Durango or the Taurus. Accordingly, the trial court did not err in failing to provide a jury instruction on the rear-end collision statute, MCL 257.402(a).

On cross-appeal, Matejek argues that the trial court erred in failing to grant her motions for directed verdict on the issues of negligence and causation. Because we affirm the jury

verdict of no cause of action on plaintiffs' claim against Matejek, we need not address these issues.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage